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March 25,2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration
CC Docket No. 00-249
Resoonse to Verizon February 10 Letter

Dear Ms. Dortch:

Cox Virginia Telcom, Inc. ("Cox"), by its attorneys, hereby submits this response to the February 10,2003 letter (the "February 10 Letter") of Kelly Faglioni, counsel to Verizon Virginia, Inc. ("Verizon"), in the above-referenced proceeding.[1] As shown below, the Commission should accord no weight to the February 10 Letter. The Commission correctly decided Issue I-6 in the *Non-Cost* ***Order,*** and there is no reason to modify that conclusion.[2] Further, the state decisions proffered by Verizon are irrelevant to the Commission's legal

[1] Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration, CC Docket No. 00-249. Cox is tiling a motion for leave to submit this response on this date.

[2] Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Petition of Cox Virginia Telcom Inc. Pursuant tn Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration, Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., ***Memorandum*** *Opinion and* ***Order,*** CC Docket Nos. 00-218,OO-249, 00-251, DA No. 02-0731 (Wireline Comp. Bur.) (rel. July 17, 2002) (the *"Non-Cost Order").*

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determinations and provide no basis for overturning the factual conclusions reached based on sworn testimony and cross-examination at the arbitration hearing.[3]

First, the Commission should accord no weight at all to state regulators' analysis of federal law and the Commission's rules. As Cox explained in its briefs in this proceeding, the Commission, not any state regulator, is in the best position to interpret the rules the Commission promulgated and the requirements of the Communications Act.[4] As the Third Circuit has held, states have no special expertise in federal law – unlike the Commission – and only the Commission has been assigned the role of interpreting its rules by Congress.[5] This analysis makes perfect sense: after all, the Commission, not the states, wrote the rules that are being interpreted. Thus, there is no basis at all to treat state interpretations as even persuasive authority.

Second, nothing in the materials provided with the February 10 Letter should affect the factual conclusions reached by the Commission in the *Non-Cost* ***Order.*** **As** the *Non-Cost* ***Order*** explains, the record in this proceeding shows "that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time" and that "Verizon concede[d] that currently there is no way to determine the physical end points of a communication, and offers no specific contract proposal to make that determination."[6] These conclusions were reached after consideration of pre-filed testimony and extensive cross examination at the hearing. Despite Verizon's efforts to limit the Commission's analysis to a single type of traffic that Verizon wishes to target, these conclusions were based on the recognition that many types of traffic, including remote call forwarding traffic, traffic routed through a customer's local area network and leaky PBX calls, were both implicated by Verizon's proposed language and entirely undetectable in the current environment.[7] **As** described in more detail below, none of the state decisions cited by Verizon were based on a similar record, and therefore they do not provide any factual basis for overturning the *Non-Cost* ***Order.*** In fact no less than four of the state decisions require the parties to attempt to work out a ***new*** mechanism to

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[3] Cox notes that the February 10 Letter continues Verizon's pattern of following Commission rules and procedures only when it suits Verizon to do so. Although the pleading cycle has long since been completed, Verizon did not seek leave to tile the letter. Further, Verizon does not explain why it waited until February to inform the Commission of decisions from as far hack as July, including four decisions that were reached prior to the date Verizon filed its Petition for Clarification and Reconsideration or its reply to the oppositions *to* that petition. **As** Cox explained in its motion to strike the Munsell Declaration attached to Verizon's petition, parties must meet the requirements of Section 1.106(b)(2) to have new evidence considered, and Verizon not only does not meet those requirements, but has made no effort to do so. Cox Motion to Strike the Declaration of William Munsell and Other Inappropriate New Matter, at 3-4.

[4] Cox Initial Brief at 11; Cox Reply Brief at 14..

[5] *MCI Telecommunications Corp. v. Bell* ***Atlantic*** *Pennsylvania, Nos.* 00-2257 and 00-2258, 2001 U.S. **App.** WL 1381590, at *19.

[6] *Non-Cost* ***Order,*** ¶¶ 301,302. Even the language proposed by Verizon in its Petition for Reconsideration and Clarification does not address this issue. Cox Opposition at 18-19.

[7] *Id. See also* Tr. at 1809-13 (Pitterle) (agreeing that, in various call scenarios, the originating and terminating carriers would be unable to determine whether a call was local or toll under the end-to-end analysis proposed by Verizon).

determine the originating and terminating points of calls. This demonstrates that the Commission's factual conclusions were correct.'

Verizon's claim that an "overwhelming number of state commissions . . . have concluded that implementation issues provide no roadblock" to implementation of Verizon's position in this case is not borne out by the cases it cites.' Of the nine state commission decisions Verizon cites in support of this assertion," six merely reaffirm existing state precedent that call rating should be based on the geographical endpoints of the call." These commissions did no more than affirm the existing expectations of the carriers that had operated under those rules. In this case, however, there is no Virginia precedent, so the Bureau was free to consider the issue as a matter of first impression and in light of the evidence adduced in this proceeding.

The Bureau also should not presume that the cited state commission decisions can be readily imported from their unique contexts to this proceeding. For example, in Florida and Pennsylvania, the state commissions allow CLECs to establish their own local calling areas independent of Verizon's and then use the local calling area of the party originating the call to determine whether reciprocal compensation and access charges are due. This arrangement significantly alters the structure of intercarrier compensation and necessarily affects decisions on other intercarrier compensation issues.

Moreover, some of the state commission decisions rely on erroneous information that is contradicted by the record in this proceeding. For example, the Vermont Public Service Board focused primarily on Verizon's "costs" in transporting virtual FX traffic, but appears to have conflated Verizon's actual costs in transporting this traffic (which the evidence in this proceeding

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[8] *See infra* p. 4.

[9] Letter from Kelly L. Faglioni, counsel for Verizon to Mr. Jeffrey Dygert, Assistant Bureau Chief, Common Carrier Bureau, dated February 10, 2003 at 2 (the "Verizon February 10 Letter").

[10] Of these nine decisions, two are non-final orders. *See Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 at 17 (Pa. P.U.C. Oct. 10, 2002) *("PA Order"); Petition of Global NAPs, Inc. For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New Jersey Inc.*, Docket No. TO02060320 at 9-11 (N.J. B.P.U. Feb. 6, 2003) ("*NJ Order*"). Even if they otherwise had any value, these orders would have little or no persuasive weight because they remain subject to subsequent proceedings.

[11] *Petition of Global NAPs. Inc. for Arbitrution Pursuant to Section 252(b) Of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Case No. 02-876-TP-ARB, Panel Arbitration Report, at 11 (July 22, 2002), *aff'd*, Arbitration Award, at 6-7 (Ohio P.U.C. Sept. 5, 2002); *Global NAPs Illinois, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North, Inc.*, Case No. 02-053 at 15-17 (Aug. 22, 2002), *aff'd*, Arbitration Decision, (Oct. *1, 2002); rehearing granted*, Order on Rehearing, at 44 (Ill. Commerce Comm. Nov. 7, 2002) *("IL Order"); In re Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc.*, Docket No. 2002-181-C, Order No. 2002-619 at 28-29 (S.C. P.S.C. Aug. 30, 2002) ("*SC Order"); Petition of Global NAPs. Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England, Inc.*, Final Order, , Docket No. 6742 at 22 (Vt. P.S.C. Dec. 26, 2002) ("*VT Order*"); *In re: Arbitration of the Interconnection Agreement Between Global NAPs and Verizon Rhode Island*, Arbitration Decision, , Docket No. 3437 at 46 (R.I. P.U.C. Oct. 16, 2002); *PA Order* at 15-16.

shows to be negligible) and the access charge revenue Verizon would realize in the absence of the virtual FX service.[12] The South Carolina and Pennsylvania Commissions appear to repeat this mistake.[13] The Illinois and New Jersey Commissions both explicitly recognized, as was demonstrated in this proceeding, that virtual FX traffic does not increase Verizon's transport costs and that, in any event, preservation of Verizon's revenue streams is not an appropriate focus for state regulation.[14] In the Illinois proceeding, Verizon admitted that "it will incur no more additional cost for transporting a virtual NXX call to the POI than it does for transporting any other [CLEC]-bound local call."[15] The Illinois Commission correctly concluded that Verizon's additional cost for transporting virtual NXX traffic is "trivial."[16]

Three of the decisions cited by Verizon do not even address the Bureau's central concern in the *Non-Cost* ***Order*** that there is no way to separate virtual NXX traffic from other local traffic under current rating and billing practices." Of the six commissions that do address this issue, four – Massachusetts, Florida, South Carolina, and New Jersey – directed Verizon and the CLECs to collaborate to develop a method of segregating virtual NXX traffic," while a fifth adopted a bill and keep regime for virtual NXX calls due to the switching and billing changes required to accurately measure virtual FX traffic."

These cases support the Commission's conclusions, rather than Verizon's position on this issue. Both the Florida and Illinois Commissions found that the expense of developing billing systems that would accurately separate virtual NXX traffic would be, to quote Verizon's witness in the Illinois proceeding, "costly and cumbersome."[20] Indeed, the Florida Commission left it to the parties to decide through interconnection agreements how they would compensate one another for virtual NXX traffic because "the costs of modifying the switching and billing systems to separate this traffic may be great" compared to the amount of reciprocal compensation at stake." Verizon's position in the Illinois and Florida proceedings – that actually segregating virtual NXX from other local traffic for billing purposes would be too expensive to be

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[12] The Vermont Commission first acknowledges that Verizon's costs are the same regardless of where a virtual NXX call terminates, stating that "Verizon's costs are not the relevant issue," but then goes on to say that Verizon may not be "fully compensat[ed] . . . for the costs oftransporting what the Board has defined as a toll call." *VT* ***Order*** at ***22-23.***

[13] *SC Order* at 27; ***PA*** *Order* at 13-14.

[14] *IL* ***Order*** at 41; ***NJ Order*** at 11

[15] *IL* ***Order*** at 48.

[16] *Id.*

[17] The state commissions that failed ***to*** address **this** issue include Pennsylvania, Ohio, and Vermont.

[18] ***Investigation Into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 ojthe Telecommunicaiions Act of 1996***, Order on Reciprocal Compensation, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP at **33 (Fla.** P.S.C. Sept. 10, 2002), *aff'd*, Order Denying Motions for Reconsideration, Order No. PSC-03-0059-FOF-TP (rel. Jan. 8, 2003) *("FL* ***Order"); Petition of Global NAPs, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc.*** *d/b/a* ***Verizon*** *Massachusetts f/k/a* ***New England Telephone & Telegraph*** *Co. d/b/a Bell Atlantic-Massachusetts,* Decision and Order, 02-45 at 35-36 (Mass. D.T.E. Dec. **12,** 2002) ***("MA Order"); SC Order at 28-29; NJOrderat*** 11-12.

[19] *IL* ***Order*** at 45.

[20] *IL* ***Order*** at 45.

[21] *FL* ***Order*** at 33.

worthwhile – is consistent with its testimony in the Virginia arbitration proceeding that there is no way, under current practice, to determine the actual geographical end points of calls with common NXX codes. It also is, however, inconsistent with Verizon's more recent position that traffic studies can be cheaply and easily performed to estimate accurately virtual FX calling volumes.[22]

Some of the state commissions did accept Verizon's bare assertion that traffic studies can accurately estimate virtual NXX traffic.[23] **As** Cox has demonstrated previously, however, Verizon's traffic study proposal is not properly before the Bureau in this proceeding. Even if it were, however, adoption of such a proposal creates its own problems. The cases show that Verizon was no more specific in proposing traffic studies to state commissions than it was in the Munsell Declaration.[24] This vague proposal is destined to cause continuing disputes in every jurisdiction in which it is adopted. Indeed, the Massachusetts Commission accepted Verizon's assertion that traffic studies could be developed to estimate virtual NXX traffic, but acknowledged that it expects to become involved in the process of developing this refined call-rating process.[25] The South Carolina, New Jersey, and Florida commissions also are likely to find themselves in the middle of disputes once the carriers begin to collaborate on virtual NXX traffic studies. Indeed, as Cox showed in its opposition to Verizon's petition for reconsideration, there would be significant difficulties that could preclude development of usable traffic studies for virtual NXX traffic.[26] In any event, the Commission has neither the time nor the mechanisms to involve itself in day-to-day disputes concerning the details of traffic studies, and Commission intervention certainly would be required to resolve the disputes that would arise under Verizon's latest proposal.

In sum, there is nothing in the February 10 Letter or in the cases it cites that should lead the Commission to modify the conclusions it reached in the *Non-Cost* ***Order.*** Instead, the Commission should affirm that decision forthwith.

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[22] See Verizon's Petition for Clarification and Reconsideration of July 17,2002 Memorandum Opinion and Order, filed August 16, 2002; Declaration of William Munsell, filed August 16,2002; ***see also*** *SC* Order at 28-29; *RI* Order at 49; *NJ Order* at 11-12.

[23] SC Order at 28-29; *RI* Order at 49; *NJ* Order at 11-12.

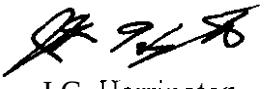
[24] ***See,*** *e.g.*, *R.I.* Order at 49; *NJ* Order at 11-12.

[25] ***MA*** Order at 35.

[26] Cox Opposition at 17-18.

Please inform us if any questions should arise in connection with this letter.

Respectfully submitted,



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cc: **As** per attached service list

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 25th day of March, 2003, copies of the foregoing "Response to Verizon February 10 Letter" were served as follows:

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